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No. 71-720

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOHN PHILIP CERONE, SR. and JAMES CERONE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners John Philip Cerone, Sr. and James Cerone respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on September 15, 1971.

Opinion Below

The judgment of conviction of the United States District Court for the Northern District of Illinois is not reported. The opinion of the Court of Appeals for the Seventh Cir-

cuit has not yet been officially reported. It is printed as Appendix "A" to this Petition.

Jurisdiction

The judgment of the Court of Appeals affirming the judgment of conviction and sentence of the District Court was entered on September 15, 1971. A timely Petition for Rehearing *en banc* was denied on October 26, 1971, and is printed herein as Appendix "B".

The jurisdiction of this Court is invoked under and pursuant to 28 U.S. Code 1254(1).

Questions Presented

1. Does the exception to the hearsay rule within the elastic conspiracy doctrine as heretofore applied in federal trials violate the Sixth Amendment's confrontation clause in the light of recent rulings by this Court on the constitutional right of confrontation and cross-examination?

2. Does the judicial presumption implicit within the limiting instructions pursuant to the conspiracy exception to the hearsay rule fail to meet the constitutional standard for such presumption as announced in *Leary* v. *United States*, 395 U.S. 6 (1970)?

3. May a defendant be denied access to Grand Jury minutes where a "particularized need" was demonstrated and where no compelling interest by the government was shown why the transcript should not be made available to defendants for purposes of impeachment? Is the government permitted yet to play games, or in the interests of fair trial and quest for truth and in accordance with recent holdings by this Court (*Dennis* v. *United States*, 384 U.S. 855 (1966)), may not production of Grand Jury minutes be compelled where the circumstances demonstrate

that the credibility of the only government witness to give testimony against petitioners might have been significantly impeached?

4. Were the petitioners, nevertheless, deprived of due process of law upon consideration of the totality of the circumstances of this case, including (a) gross abuse of the conspiracy evidentiary exceptions; (b) intentionally prejudicial joinder of defendants; (c) misuse of the separate conspiracies doctrine; (d) total failure to prove any agreement with the other alleged conspirators; (e) the total insufficiency that either petitioner had any knowledge of the interstate character of the alleged conspiratorial object; and (f) highly inflammatory prosecution tactics?

Constitutional and Statutory Provisions Involved

The Sixth Amendment to the Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

The general conspiracy statute, Title 18, U.S. Code, Sec. 371, provides: "If two or more persons conspire either to commit any offense against the United States . . . in any manner or for any purpose and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Title 18, U.S. Code, Sec. 1952 provides, in pertinent part:

> "(a) Whoever . . . uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> . . . . . .
>
> (3) . . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment,

or carrying on, of any unlawful activity, . . . shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling . . . offenses in violation of the laws of the State in which they are committed . . ."

Statement of the Case

1. *The charges*

The petitioners, John Philip Cerone, Sr. and James Cerone, were indicted with Donald John Angelini, Frank Anthony Aureli, Dominic Cortina and Joseph Ferriola and charged with violation of 18 U.S. Code, Sec. 1952 in that they conspired with each other from June, 1965, to about February 6, 1969 and with certain other unindicted co-conspirators to use interstate facilities to facilitate, permit, manage, establish and carry on an unlawful activity, a gambling enterprise, in violation of the laws of the State of Illinois. (Ill.Rev.Stat., Chap. 38, Secs. 28-1 (a)(1)(2)(5)(10))

Other defendants, Aureli alone in Count 2 and Angelini alone in Count 3, were charged with substantive violations of 18 U.S. Code 1952.

2. *The motions for severance and demand for Grand Jury minutes*

Pre-trial and in-trial motions of petitioners for severance were repeatedly denied. (A. 2-3)[1]. James Cerone moved in advance of trial for the production of the Grand Jury minutes of a preceding indictment, # 69 CR 63, point-

[1] "A." refers to printed Appendix of the Record as filed by the petitioners in the Court of Appeals in case # 18551.

ing out that in the earlier indictment only three defendants were named—John Philip Cerone, Sr., Angelini and Aureli—but that in the instant indictment, he was added together with Cortina and Ferriola, and that having shown a "particularized need" the Grand Jury minutes productive of both indictments should be made available. (A. 2)

3. *Trial and verdict occurrences*

Defendant Aureli became ill during the trial, after the government concluded its case; a mistrial was declared as to him. He underwent an emergency operation; thus, he was unavailable to be called as a witness for petitioners, although the government made full use of what Aureli was supposed to have said to the only government witness, Louis Bombacino, about petitioner John Cerone, Sr.—which purported statements were made outside Cerone's presence and were not in furtherance of any conspiracy. Thus, Cerone was deprived even of the opportunity to refute such inadmissible evidence.

The trial commenced on April 20, 1970 (A. 5) and the evidence was concluded on Thursday, May 7, 1970. (A. 56) The court instructed the jury at 9:00 a.m. on Friday, May 8, 1970 and the jury commenced deliberations at 9:45 a.m. Twelve hours later, at about 9:45 p.m., the court read a note sent by the jury stating:

> "We have reached a verdict on all but Two of the defendants and we have been deliberating six hours on these Two, and at this point are far away from a verdict, and I do believe we have a hung jury on these Two." (A. 4)

At about 10:00 p.m., the court received the verdicts of the jury finding defendants Angelini, Cortina and Ferriola guilty. The Cerones' motion for mistrial was denied (A. 4). The court sequestered the jury for the night, ordered

them to resume deliberations on Saturday, May 9, 1970, and after further deliberations, the Cerones were found guilty.[2]

4. *The evidence produced by the government*

Most all of the evidence supportive of the government's case is set out in the Court of Appeals opinion, appended hereto as Appendix "A", at pages 1 to 11.

In summation, the government showed through testimony of witness Louis Bombacino that, commencing in 1965 he had contacted defendant Frank Aureli and then gone to work for Aureli in the taking of gambling bets over the telephone at various addresses in Cook County, Illinois. At various times in 1965 and 1966, Aureli told Bombacino that they would be moving their location and particularly, in October, 1965, Aureli told Bombacino that he would be working for defendants Angelini and Cortina. Bombacino would pick up sports schedules from the offices of the Angel-Kaplan Sports Service (wholly owned by Angelini). Bombacino would call Angelini's sports service to obtain the daily line. Bombacino testified, that in 1966 he met Ferriola and one Turello and had a discussion about a bookmaking establishment; again in January, 1966, Bombacino met Ferriola, who told Bombacino to get certain betting records for Ferriola's inspection; further, that Ferriola gave him, Bombacino, certain orders and directions with respect to bets. In June and July of 1966, Bombacino met with Aureli and defendant Cortina and, in connection with the booking of bets, Cortina told Bombacino that Aureli was going to take a vacation because he had been arrested for gambling and that Bombacino and un-

[2] All defendants were sentenced to a term of 5 years and a fine of $10,000.

indicted alleged co-conspirator Molose should take the out of town action at Bombacino's house. Once, in December, 1966, Bombacino was visited in his apartment by Cortina and Aureli and a conversation ensued about gambling.

5. *Evidence pertaining to the Cerones*

On December 27, 1966, a man, Lefty, phoned Bombacino, as a result of which Bombacino went to a restaurant, Meo's Norwood House, in Norwood, Illinois, where he saw and talked with petitioner John Cerone,[3] who told Bombacino that he had been hearing nothing but favorable reports about Bombacino and that he had something in mind for him, but had to talk to someone first, and that Bombacino should meet him the following day at a bar called "The Leather Bottle." Bombacino returned to his apartment, telephoned Aureli about the conversation with Jack Cerone, whereupon Aureli replied, over objections, "Good. You're really getting up there." (A. 11)

The next day, Bombacino was in The Leather Bottle and "Lefty" directed him across the street to a restaurant, Armand's Pizzeria, which he entered and saw Jack Cerone seated alone. Cerone told Bombacino he wanted him to "take some big bettors with the additional what I got." (A. 12) A few minutes later, petitioner James Cerone came in. James had known Bombacino for a long time.[4] James told Bombacino that bettors would call, identify themselves as "Goldblatt" and their initials, which would enable James to identify them. Jack Cerone telephoned someone and told that party to tell Ferriola to be at Armand's at 8 p.m. They then separated.

---

[3] Throughout the Record, petitioner John Philip Cerone, Sr., was referred to as Jack Cerone.

[4] But no evidence was presented that the acquaintanceship involved anything to do with gambling.

Bombacino again reported the conversation on the telephone to Aureli, who exclaimed, over objections, "Well, you will be making more money than I will." (A. 12)

Returning to Armand's at 8 p.m. that night, Bombacino found Jack Cerone and Ferriola in a booth. Cerone was about to introduce Bombacino to Ferriola, but Ferriola stated, "He has been with us for a long time." (A. 12) Nothing else happened because Cerone wanted to go home to watch a television program. (A. 9)

About two weeks later, Bombacino saw the Cerones at Armand's Restaurant. After Bombacino expressed his worries that he might be raided because other bookies were, Jack Cerone told him not to worry because he would be able to take care of things if Bombacino were arrested. Jack then left, and James Cerone remained to review Bombacino's records of the week's "Goldblatt" bets. After that, Bombacino met James Cerone about once a week and gave him copies of the betting sheets on the "Goldblatt" bets. Also, James would call every night. Bombacino said he kept copies of the sheets, but had destroyed them. (A. 19) In July or August, 1967, James Cerone telephoned Bombacino to tell him not to take any more bets, that nobody would be calling him any longer. (A. 14)

6. *Evidence of interstate activity*

There was no showing that from the time Bombacino met either of the Cerones that he ever took one bet on their behalf that was an out-of-state bet, or that interstate facilities were used in receiving or in processing the so-called bet.

There was some evidence that before Bombacino met the Cerones that a check was received by Bombacino in 1966

from a Nate Wigot, a gambler in Detroit (A. 15) and that when Aureli was in Florida on a vacation in April 1966, Aureli called Bombacino to ask how they were doing. Additionally, evidence was introduced that Angelini, who ran a sports news service, would mail his service, a general newspaper publication, to out-of-state customers.

7. *The decision on appeal*

Petitioners had argued in the Court of Appeals that the quantum of evidence against them that they entered into an agreement with the other alleged co-conspirators to further the purposes of the alleged already-existing conspiracy was of "gossamer filament" and that there was no evidence whatsoever to show that either petitioner had any knowledge of the interstate character of the conspiratorial object, citing *United States* v. *Twitchell*, 313 F. 2d 425, 429 (9 Cir. 1963): "The degree of knowledge required of the interstate aspect thus increases as the defendants' connection with the core agreement becomes more tenuous", and *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943); *Ingram* v. *United States*, 360 U.S. 672 (1959), and *United States* v. *Barnes*, 383 F. 2d 287 (6 Cir. 1967). In *Barnes*, the Sixth Circuit reversed the convictions of two defendants who were partners with a third in an illegal activity—gambling, in violation of state law, because ". . . suspicions, speculations and surmise are not sufficient to sustain their conviction." (383 F.2d 293)

The Appeals Court ignored commenting on or distinguishing any of the cases cited which were directly applicable. In this aspect, then, petitioners have had no meaningful review of their convictions. Instead, the Appeals Court merely cited the existing cases supportive of the sweeping rule permitting the free-wheeling evidentiary concepts of conspiracy cases.

Summary of Argument

Petitioners contend that the conspiracy exception to the hearsay rule as heretofore applied in federal courts violates the confrontation clause of the Sixth Amendment to the Constitution of the United States as interpreted in *Douglas* v. *Alabama*, 380 U.S. 415 (1965); and *Bruton* v. *United States*, 391 U.S. 123 (1968), even considering the interpretation by the prevailing Justices in *Dutton* v. *Evans*, 400 U.S. 74 (1970).

This question is ripe for determination by this Court because certiorari was granted in *Bostic* v. *United States*, 400 U.S. 991 (Jan. 1971) to consider this very point. Although the writ in *Bostic* was later dismissed as having been improvidently granted, *Bostic* v. *United States*, 402 U.S. 547 (May, 1971), your Honors made clear that the reason for the dismissal was that the grant of the writ was allowed on mistaken facts that the petitioner, Bostic, had been convicted of the offense of conspiracy when, in fact, his conviction was not so predicated. Accordingly, the question your Honors were ready to undertake to resolve yet remains viable, and we submit the instant case is the appropriate vehicle for resolution of this vexing, recurring problem in the federal courts.

All the more is that true in the case at bar because the statements supposedly made by alleged co-conspirator Aureli to government witness Bombacino (who was not a co-conspirator) were the basis of the prosecutor's inflammatory argument to the jury that petitioner Jack Cerone was "King of the Empire". And even under the most elastic and sprawling of exceptions to the hearsay rule, the statements of Aureli, made outside the presence of Cerone and not adopted by him, were not made in furtherance of or in pursuance to the alleged conspiracy.

Further, it is contended that within the direct holding of *Bruton*, the case should be reversed because of inadmissible impeachment of one of the witnesses for co-defendant Ferriola, which impeachment the trial court sought to limit for use against Ferriola only although, as a realistic and practical matter, the impeachment was designed to and did tar every defendant with the brush of serious accusation that the witness was in fear of his life.

Additionally, in the totality of the circumstances of this case, it should be determined (1) whether there was any evidence by which a jury could properly infer that the Cerones knew of the interstate character of the gambling enterprise and that (2) even if so, whether or not the rationale of this Court's holding in *Kotteakos* v. *United States*, 328 U.S. 750 (1946), does not compel reversal.

Also, this case is a proper vehicle for the formulation of rules permitting transcripts of Grand Jury minutes to be used by defense for purposes of impeachment where "a particularized need" is shown, *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395 (1959), and where there is no otherwise compelling interest shown by the government, *Dennis* v. *United States*, 384 U.S. 855 (1966).

Finally, petitioners contend the decision by the Court of Appeals here is in conflict with the decisions by the Sixth Circuit in *United States* v. *Barnes*, 383 F.2d 287 (1967) and the Ninth Circuit in *United States* v. *Twitchell*, 313 F. 2d 425 (1963). For the Court of Appeals to have ignored discussing or distinguishing these cases amounts to a denial of petitioners' right to appellate review.

REASONS FOR GRANTING THE WRIT

1.

The free-wheeling evidentiary rules permitted by the conspiracy doctrine have been invalidated by this Court's recent rulings on the right of defendants to be confronted by the witnesses against them.

The reasoning behind this Court's grant of certiorari in *Bostic* v. *United States,* 400 U.S. 991 (Jan. 11, 1971) is yet viable. Certiorari was granted on the proposition whether or not recent rulings by this Court have invalidated the free-wheeling evidentiary rules permitted in federal courts under the conspiracy doctrine. Although the writ in *Bostic* was dismissed on May 24, 1971; 402 U.S. 547, this Court's per curiam opinion stated that the dismissal was predicated solely and only upon the erroneous grant on the consideration of a mistaken statement of facts that petitioner had been convicted of conspiracy when, in fact, he was not. In the case at bar, petitioners were convicted only of conspiracy—and a tenuous conspiracy, at that.

Although the Court of Appeals opinion (App. "A", p. 15-16) states that there is direct evidence against the Cerone petitioners because of their vis-a-vis statements to the government witness Bombacino, the government relied on admittedly hearsay evidence to prove the existence of the alleged conspiracy and further relied on co-defendant Aureli's alleged statements to Bombacino, made outside Jack Cerone's presence, and not in furtherance of any conspiracy that he, Bombacino, was ". . . really getting

up there . . ." and that he, Bombacino ". . . will be making more money than I will." (App. "A", pp. 8-9). These alleged statements of Aureli provided the basis for the prosecutor's "King of the Empire" argument to the jury with which Jack Cerone was tarred. Although this Court's plurality opinion in *Dutton* v. *Evans*, 400 U.S. 74 (1970) did not equate the Sixth Amendment confrontation clause with the evidentiary hearsay rule of exclusion in interpreting a Georgia statute permitting declarations of one conspirator to a third party after the conspiracy had ended, we point out that the grant of the writ in *Bostic* was on January 11, 1971, after the decision in *Dutton*.

Here, the conviction was based upon the admission of evidence normally inadmissible because of its being highly prejudicial and being in violation of the Sixth Amendment right of confrontation. Its admittance was based upon the exceptions permitted in conspiracy prosecutions, with such limiting instructions by the court, notwithstanding the caveat by Mr. Justice Jackson in *Krulewitch* v. *United States*, 336 U.S. 440, 453 (1949): "The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. *Blumenthal* v. *United States*, 332 U.S. 535, 539, 559, all practicing lawyers know to be unmitigated fiction."

The special evidentiary rules in conspiracy cases are unconstitutional. Essential to the conviction where otherwise inadmissible evidence is admitted under the conspiracy exception, is the "judicial presumption" that the jury can abide by certain limiting instructions. Introduced in evidence were statements of alleged co-conspirators. Except for the unique rules governing conspiracy, such hearsay evidence would not be admissible. *Bruton* v. *United States*, 391 U.S. 123 (1968). The court attempted to remove

the normal prejudice flowing from the admission of such "hearsay" by giving to the jury instructions which attempted to limit the jury's consideration of such evidence.

These instructions require the jury to hear the evidence damaging to defendant, but remove it from their minds in regard to certain determinations, and then consider the evidence for other determinations. Permitting the introduction of such evidence and then attempting to remove the effect of such prejudicial evidence by instructions, is based on the presumption that the jury can follow such instructions. In *Leary* v. *United States*, 395 U.S. 6 (1970), the court considered the constitutionality of "criminal statutory presumptions." No sound reason exists that "judicial criminal presumptions" should not be judged by the same standard. In *Leary*, the court stated "that a criminal statutory presumption must be regarded as 'irrational or arbitrary' and hence unconstitutional unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Similarly, the presumption that the jury will abide by the limiting instruction is arbitrary unless it can be said with substantial assurance that the presumed fact, i.e., that the jury will and can abide by such instruction in conspiracy cases, is more likely than the recognized fact, that a jury cannot departmentalize its mind and will in all probability consider evidence highly prejudicial to defendant when such evidence consists of statements of co-defendants. *Bruton* v. *United States*, 391 U.S. 123. See also *Jackson* v. *Denno*, 378 U.S. 368 (1964).

In *Bruton*, the court held that the jury cannot abide by an instruction not to consider against defendant a co-defendant's statement implicating defendant. The court

relied upon its prior findings in *Jackson* v. *Denno*, that juries can not wipe from their mind, or limit their consideration, of highly prejudicial evidence.

The presumption that the jury in conspiracy cases can function differently from a jury selected in all other cases is not based upon any scientific determination. It is contrary to all other determinations by the court relative to similar areas. The presumption is therefore "irrational and arbitrary and hence unconstitutional."

The unfairness of permitting the introduction of the hearsay testimony of Aureli is great in the instant case due to certain unique facts, to-wit: (1) it was made the basis for considerable of the prosecutor's closing argument calling Jack Cerone the "King of the Empire", (2) Aureli became seriously ill during the course of the trial and was severed from the case, thus precluding any cross-examination of Aureli in this area, and (3) the trial court had both before the trial and during denied petitioners' motions for severance. Hence, there exists the very circumstance held to be most prejudicial, i.e., defendant being denied the right to cross examination relative to extremely damaging statements of co-defendant. In *Bruton*, Justice Stewart, in his concurring opinion (391 U.S. 137, 138) states:

> "I join the opinion and judgment of the Court. Although I did not agree with the decision in *Jackson* v. *Denno*, 378 U.S. 368 . . . I accept its holding and share the Court's conclusion that it compels the overruling of *Delli Paoli* v. *United States*, 352 U.S. 232, 1 L. Ed. 2d 278, 77 S. Ct. 294.
>
> "Quite apart from *Jackson* v. *Denno*, however, I think it clear that the underlying rationale of the Sixth Amendment's Confrontation Clause precludes reliance

upon cautionary instructions when the highly damaging out-of-court statement of a co-defendant, who is not subject to cross examination, is deliberately placed before the jury at a joint trial. A basic premise of the Confrontation Clause, it seems to me, is that certain kinds of hearsay (see, e.g., *Pointer* v. *Texas*, 380 U.S. 400, 13 L.Ed. 2d 923, 85 S. Ct. 1965; *Douglas* v. *Alabama*, 380 U.S. 415, 13 L. Ed. 2d 934, 85 S. Ct. 1074) are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, *whatever* instructions the trial judge might give. See the Court's opinion, ante at 485, n. 12. It is for this very reason that an out-of-court accusation is universally conceded to be constitutionally *inadmissible* against the accused, rather than admissible for the little it may be worth. Even if I did not consider *Jackson* v. *Denno* controlling, therefore, I would still agree that *Delli Paoli* must be overruled."

There is no rational basis for distinguishing the mental ability of jurors in conspiracy cases from their ability in other cases. The judicial presumption that the jury could remove from its mind the highly prejudicial hearsay is arbitrary and therefore unconstitutional.

Petitioners had moved for a severance from the other defendants and from Aureli, who was alone indicted in Count 2 for a substantive offense, and from Angelini, who alone was indicted in Count 3 charging a substantive offense. (A. 2-3) Those motions were denied; as were motions for severance during the course of trial. When Aureli was lost to the petitioners as a possible rebuttal witness against Bombacino, (because a mistrial was declared as to him due to emergency illness which necessitated an operation), there was no meaningful way by which the government's testimony through Bombacino could be challenged—even if it met tests of admissibility

on other grounds. But it did not. How do the alleged statements by Aureli, after Bombacino's first meeting with Cerone, to the effect that "You're really getting up there" (A. 11) and again when Bombacino reported to Aureli that he was going to work for the Cerones by taking the "Goldblatt" bets for them, "Well, you will be making more money than I will." (A. 12) further the purposes of the conspiracy? It is obvious that they do not. Yet, those alleged statements were seized by the prosecutor as predicating his argument to the jury that Jack Cerone was "King of the Empire" and was responsible for all that went before his meeting with Bombacino.

The Court of Appeals relied on the plurality opinion of Mr. Justice Stewart in *Dutton, supra.* First, we point out that in the 5-4 opinion reversing the holding by the Fifth Circuit Court of Appeals *Evans* v. *Dutton;* 400 F.2d 826 (1968), the majority could not agree on an opinion. As it was pointed out in the *Bostic* Brief (#5250, Oct. term, 1970, filed with this Court,

> "The principal difficulties that divided the Court in that case were apparently (1) the fear of the majority Justices that following *Bruton's* logic to eliminate the conspiracy exception to the hearsay rule, would eliminate all hearsay from criminal trials, and (2) the view that the particular isolated extra-judicial statement there involved was really too insignificant to justify a reversal."

The fear that the logic in *Bruton* v. *United States,* 391 U.S. 123, *Jackson* v. *Denno,* 378 U.S. 368 and *Douglas* v. *Alabama,* 380 U.S. 415 (1965), will be followed to the extreme of eliminating all hearsay from criminal trials is unfounded. "The logic of those opinions extend no further than to a rather clearly defined classification directly related to the words of the confrontation clause, namely, the

narrative declarations of alleged accomplices and co-conspirators, whose testimony even under oath and subject to cross-examination is always viewed with suspicion." (*Bostic*, Brief)

Accordingly, the writ should be granted to review and decide the principles here involved.

2.

The rules with respect to allowing examination of Grand Jury minutes should be made clear as a guideline to trial courts. We are beyond the time in this country when the trial is a game to be played by rules controlled only by the prosecution.

Prior to trial, James Cerone moved for the production of the Grand Jury minutes of 69-CR-63. In that indictment, defendants John Cerone, Aureli and Angelini only were named. That was superseded by the instant indictment in which James Cerone, Cortina and Ferriola were added.

It was represented by the government, that as Bombacino did not testify before the Grand Jury in the earlier numbered case, defendant had no right to the minutes. Defendant made demand for the minutes at the time Bombacino testified, also. (Tr. 281).[5]

Certainly a particularized need was shown, a la *Pittsburgh Plate Glass Company* v. *United States*, 360 U.S. 395 (1959), for the agent who testified at the first Grand Jury could only have received his information through Bombacino; and if it could be demonstrated that there was lacking in Bombacino's narration to the agents, transmitted to the first Grand Jury, elements of Bombacino's

[5] "Tr." refers to the Transcript of the original trial proceedings as filed with the Court of Appeals in # 18551.

in-court testimony, then Bombacino could be impeached by showing that on a prior occasion he *omitted* something he now included. 3 *Wigmore on Evidence* (3rd Ed. 1940), Sec. 1042, pp. 733-734; *United States* v. *White*, 225 F. Supp. 514, 518 (D.D.C. 1963); *Cafasso* v. *Penn. R. Co.*, 169 F.2d 451, 454 (3rd Cir. 1948); *C., M. & St. P. Ry. Co.* v. *Harrelson*, 14 F.2d 893, 897 (8 Cir. 1926).

See also *Jencks* v. *United States*, 353 U.S. 657, 667 (1957):

> "Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross examining process of testing the credibility of a witness' trial testimony."

Where secrecy does not serve a legitimate policy consideration, no reason exists why the minutes should not be made available for possible use on cross-examination of the *only* witness implicating the instant defendants. See *Dennis* v. *United States*, 384 U.S. 855, 870 (1966), establishing that "after the grand jury's functions are ended disclosure is wholly proper where the ends of justice require it."

It certainly was material to ascertain whether the F.B.I. agent's testimony at the earlier Grand Jury omitted any references to James Cerone; and particularly what references, if any, he made about John Cerone. If he failed to tell the agents about James Cerone, then there was a due process failure, because Bombacino could be impeached upon such failure. This error is of constitutional dimensions: *Giles* v. *Maryland*, 386 U.S. 66 (1966); *Brady* v. *Maryland*, 373 U.S. 83 (1963).

And we submit further that Rule 16(b) F.R.Cr.P., 18 U.S. Code, requires disclosure, under the particular circumstances herein set out. *Cf. United States* v. *Hughes*, 413 F.2d, 1244 at 1255-1256 (5 Cir. 1969).

There was no valid reason for the government to insist on refusing to make available the earlier Grand Jury minutes. What was there to hide—except possible impeaching material? And a trial is not a game. As it was stated in *Hughes*, p. 1249,

> "The revised Rule operates on the premise that 'abuses [of discovery] are a matter of legitimate concern—they argue, however not for wholesale prohibition of criminal discovery but for circumspection and for appropriate sanctions tailored to delivering of apprehended abuses in the particular case.' Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth? 1963, Wash. U. L. Q. 279, 292."

3.

The holding here is in conflict with the holdings of this court and of two other circuits; certiorari should be granted to resolve the conflict.

There was not a word of evidence in the entire long record that either of the Cerone petitioners had any actual knowledge of interstate gambling activity. With respect to their own alleged participation in receiving gambling bets from the so-called "Goldblatt" bettors, although government witness Bombacino testified he took bets daily from January, 1967 to the end of July, 1967, there is not one word of corroboration as to whether or not he took those bets, whether or not he ever saw or met with James Cerone to turn over the results of those bets, even though Bom-

bacino supposedly was in contact daily with F.B.I. agents and was working as an undercover informer for them.

Not one word of corroboration!

The government was then left with attempting to show that the Cerones should have known of the interstate character of the operations that went on in 1965 and 1966 before they met with Bombacino. The evidence of interstate activity with respect to the other co-conspirators was that a man, Nate Wigot, was a big bettor from Detroit with whom Bombacino spoke on the phone. Telephone bills were introduced showing phone calls from Wigot's place of business in Detroit to Bombacino's telephone number. (A. 9) Bombacino also received a check from Wigot through the mails, which he either cashed or turned over to Aureli (A. 15). And, in April, 1966, Aureli went to Florida and telephoned Bombacino every evening to ask how they were doing. (A. 9) The long-distance toll calls were turned over to F.B.I. agent Frankfort (A. 14). Copies of betting sheets Bombacino kept while working for Aureli were also turned over to F.B.I. agent Frankfort.

Even though the government reluctantly conceded "that some of the defendants (the Cerones) had no knowledge of the conspiracy interstate activities" (Gov't. Brief in Court of Appeals, p. 62), the Appeals Court opined—without any foundation in the record and without setting out any single, specific piece of evidence—that the Cerones had knowledge that facilities in interstate commerce "was included within the scope of the conspiracy." (Op., App. "A", p. 17).

The Ninth Circuit Court of Appeals reversed the conviction in *United States* v. *Twitchell*, 313 F.2d 425 (1963) stating, p. 429:

> "The degree of knowledge required of the interstate aspect thus increases as the defendants' connection with the core agreement becomes more tenuous."

The *only* evidence of interstate betting activity was Bombacino's assertions that Nate Wigot from Detroit was a telephone bettor in the Spring of 1966. (A. 9) That had nothing to do with Cerones' knowledge of same. Even if one may stretch every factual inference to its outermost limit that the Cerones knew, or had to know, of the conspiratorial gambling activities previous to December, 1966, how does one surmise or guess that such gambling activity embraced interstate operations? After all, gambling, for the most part, is an intra-state activity, whether such gambling is carried on legally or illegally. The holding in the case at bar peculiarly violates the warnings by this Court in *Direct Sales Company* v. *United States*, 319 U.S. 703, 711 (1943), wherein the Court stated:

> "Without the knowledge, the intent cannot exist. *United States* v. *Falcone*, 311 U.S. 205 . . . Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. Ibid. This because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what, in that case, was called a dragnet to draw in all substantive crimes."

For similar reasons—lack of knowledge on the part of alleged co-conspirators—this Court reversed the convictions of two gamblers in *Ingram* v. *United States*, 360 U.S. 672 (1959). Convictions of the two were reversed because although they were participants in a conspiracy to operate a lottery and conceal that operation from local law enforcement agencies, there was no proof that they knew the other two alleged co-conspirator defendants did not pay taxes for which they were liable by reason of the gambling operations. And, just as ". . . an essential ingredient of the proof was knowledge on the part of Smith and Law that Ingram and Jenkins were liable for federal taxes by reason

of the gambling operation" (360 U.S. 678), there is totally lacking in the case at bar any knowledge on the part of the Cerone petitioners that the gambling activities engaged in by the other alleged co-conspirators was of interstate character. In *Ingram*, it was shown that Smith and Law (whose convictions were reversed) were intimately connected with the lottery operation, conducting it secretly and with knowledge that it was profitable. "Yet these circumstances actually are colorless as to the vital issue of knowledge on the part of Smith and Law that their superiors owed federal wagering taxes." (360 U.S. 679)

Even if the equivocal statement attributed to Ferriola by Bombacino at the Jack Cerone-Bombacino-Ferriola meeting on December 28, 1966 that "he has been with us for a long time" may impute knowledge on the part of Jack Cerone that there pre-existed gambling activities, such is absent in knowledge, inferential or otherwise, that Jack Cerone would have to know that the pre-existing betting activities involved interstate facilities.

And as to the petitioner James Cerone, who was not present at the alleged Ferriola meeting, there was no proof whatsoever that he even knew of any alleged pre-existing betting activity or conspiracy, much less any proof that he knew of the use of interstate facilities in that pre-existing conspiracy.

The Court of Appeals' opinion in the case at bar conflicts with the decision by the Sixth Circuit in *United States v. Barnes*, 383 F.2d 287 (1967). All three partners who ran a dice game in Nashville, Tennessee were convicted, checks were accepted from customers in payment of their gambling losses. All three partners handled customers' checks, but there was no evidence that two of them, Washer and Carney, handled the particular checks which were cashed

out of state. Only one partner's name, Barnes, appeared on the checks. The government also made proof that Barnes purchased gambling equipment from out of state. There was no dispute that all three were active partners in the operation of the gambling establishment, in violation of the Tennessee criminal statutes. Even though the government argued that it would be naive to suppose that Washer and Carney who had been closely associated with each other and with Barnes in the gambling business for years, would not know of the interstate activities of that gambling enterprise, the Sixth Circuit reversed because:

> ". . . the inferences must be justifiable ones, and mere suspicion that Washer and Carney must have known, or reasonably could have been expected to know about Barnes' conduct, will not suffice." (383 F.2d at 291)

That Court held that whatever suspicions or speculations might be indulged in, ". . . such suspicions, speculations and surmise are not sufficient to sustain their conviction." (383 F.2d at 293)

In accord: *United States* v. *Dunn*, 299 F.2d 548, 554-555 (6 Cir. 1962); *Moore* v. *United States*, 271 F.2d 564, 568 (4 Cir. 1959); *Guevara* v. *United States*, 242 F.2d 745, 747 (5 Cir. 1958); *Wise* v. *United States*, 241 F.2d 545, 547 (5 Cir. 1957).

Just as gambling, *per se*, is not a federal offense, neither is prostitution or conspiracy to maintain a house of prostitution. In reversing the conviction of a county sheriff who was charged with conspiracy with various madams to permit them to operate houses of prostitution on a monopoly basis, the federal question was whether there was sufficient evidence to show the sheriff's knowledge of the interstate transportation of prostitutes who worked

for the madams. The decision in *Twitchell* v. *United States*, 313 F.2d 425 (9 Cir. 1963) is peculiarly applicable to gambling conspiracy cases. The Ninth Circuit ruled that such cases differ from federal conspiracy cases where the federal element is necessarily involved, such as in mail fraud cases or in conspiracies to defraud the United States. Where the federal element is tangential to and not necessarily involved as the principal object of the conspiracy, proof of actual knowledge of the interstate character of the offense must be shown before a conviction would be affirmed. (313 F. 2d at 429).

It is obvious that the principal object of the alleged conspiracy in the case at bar was to violate the gambling laws of the State of Illinois. Thus, it must be shown that the conspirators had actual knowledge of the interstate character of the enterprise. *United States* v. *Sherman*, 161 F.2d 619 (2 Cir. 1948); *United States* v. *Crimmins*, 123 F.2d 271 (2 Cir. 1941); *United States* v. *Bollenbach*, 147 F.2d 199 (2 Cir. 1945). Even cases from the Seventh Circuit are in accord: *United States* v. *Gardner*, 171 F.2d 753 (1948) and *Gable* v. *United States*, 84 F.2d 929 (1936).

The law with respect to the required quantum of proof of knowledge of interstate character of offenses such as here involved, although clear from the cases herein cited, still needs clarification by this Court for the guidance of lower courts and to resolve the conflicts between the Seventh Circuit and the other circuits cited herein.

These petitioners were prejudiced in their right to a fair trial when the court declined to grant a severance when a co-defendant's witness was impeached with testimony by the United States Attorney. The court's limiting instruction that such testimony did not apply to other defendants who did not call the witness whose testimony was impeached could not have been effective in view of the prosecutor's theory that Jack Cerone was "King of the Empire".

Ferriola called Nicholas Kokenes as his witness. Kokenes owned the M.G.M. Restaurant and testified he never saw Ferriola sit in his restaurant at a round table with Aureli, Kokas, Varlos and Bombacino, on June 26, 1965, as Bombacino testified. (A. 5). Kokenes testified he also gave this information to the government. (A. 45).

On cross-examination, the prosecutor asked if Kokenes requested of the U. S. Attorney, Thomas Foran, that they meet at some place other than the federal building, because he was in fear of being seen in the company of the United States Attorney. (A. 46-47). The witness denied such statement. (A. 47).

In rebuttal, Foran testified that Kokenes told him "I can't talk to you here [the federal building]. Those fellows can't know that I am talking to you." (A. 56).

The admission of such testimony against Ferriola was prejudicial to the Cerone defendants.

The fact that the witness feared "those fellows" to know that he was conferring with the United States Attorney, was pregnant with the accusatorial implication that harm might come to him for cooperating with the government.

The court attempted to limit the prejudicial effect against the petitioners by instructing the jury that it is admitted

"only as to the credibility of the witness Kokenes." (A. 55). This is insufficient to inform the jury properly of the limited use of such rebuttal. *Slade* v. *United States*, 267 F.2d 834, (5 Cir. 1959). Nor could any subsequent instruction remove the effect of this out-of-court statement that the witness was in fear of "those fellows." *United States* v. *Lyon*, 397 F.2d 505 at 510 (7 Cir. 1968) *Bruton* v. *United States*, 391 U.S. 123 (1968); *Burgett* v. *Texas*, 389 U.S. 109 (1967).

In *Bruton* v. *United States*, 391 U.S. 123, the court held the jury could not strike from its mind, out-of-court statements of one defendant accusing another. Similarly, a jury cannot strike from its mind a statement of "fear" about "those fellows." We emphasize that the identity of "those fellows" was unlimited.

The cross-examination of witness Kokenes, and the rebuttal by the United States Attorney constituted error of constitutional dimension, even if the government's rebuttal is deemed necessary to delimit Kokenes' testimony on behalf of Ferriola.

In *DeLuna* v. *United States*, 308 F.2d 140 (8 Cir. 1962), the court held that defendant must receive a new trial where counsel for one co-defendant commented on the other's failure to testify. Similarly, where in response to actions of a co-defendant, the government presents evidence inadmissible and prejudicial as to defendants at bar, these defendants should be afforded a new trial. The sole means to insure that a defendant receives a fair trial is a severance. Limiting instructions are insufficient. *Bruton*, *supra*.

The improper denial of defendants' numerous motions for severance both before and during trial, requires reversal.

As to this claimed error, the Appeals Court was mistaken in its holding that "Defendants offered Kokenas as a witness * * *" (See Op., App. "A", p. 24).

The record is crystal clear that only defendant Ferriola offered Kokenas as a witness. (A. 55; Tr. 1815)

Contrary to the Court of Appeals' assertion that "defendants" offered Kokenas as a witness, separate counsel for each of the Cerone petitioners objected to the applicability as to them of any conversations between Kokenas and the United States Attorney (A. 55), and further pointed out to the Court that the witness Kokenas was called by the defendant Ferriola; and, "we have no control of the calling of any witness by any co-defendant." (A. 55; Tr. 1815). The petitioners' motions for mistrial after the impeaching testimony were denied. (A. 56)

The Court of Appeals further suggested that if petitioners felt they were prejudiced by the testimony of the United States Attorney, they could have cross-examined him. But that is hollow rationalization, where defendants disavowed that the impeachment could be applicable as to them and where the court gave a limiting instruction of no effect, to the jury.

On Petition for Rehearing *en banc*, we called to the Court of Appeals' attention its erroneous statement that "Defendants offered Kokenas as a witness." (Pet. Rhrg. *en banc*, in # 18551, p. 10). The mistake went uncorrected. (See Op., App. "A", p. 24).

Conclusion

Because the issues here are of transcendental importance to the administration of criminal justice, and because the holding by the Seventh Circuit is in conflict with the holdings of this Court and those of other Appellate Courts, and is also partially based on an erroneous statement of facts, we submit the Writ of Certiorari should be granted.

Respectfully submitted,

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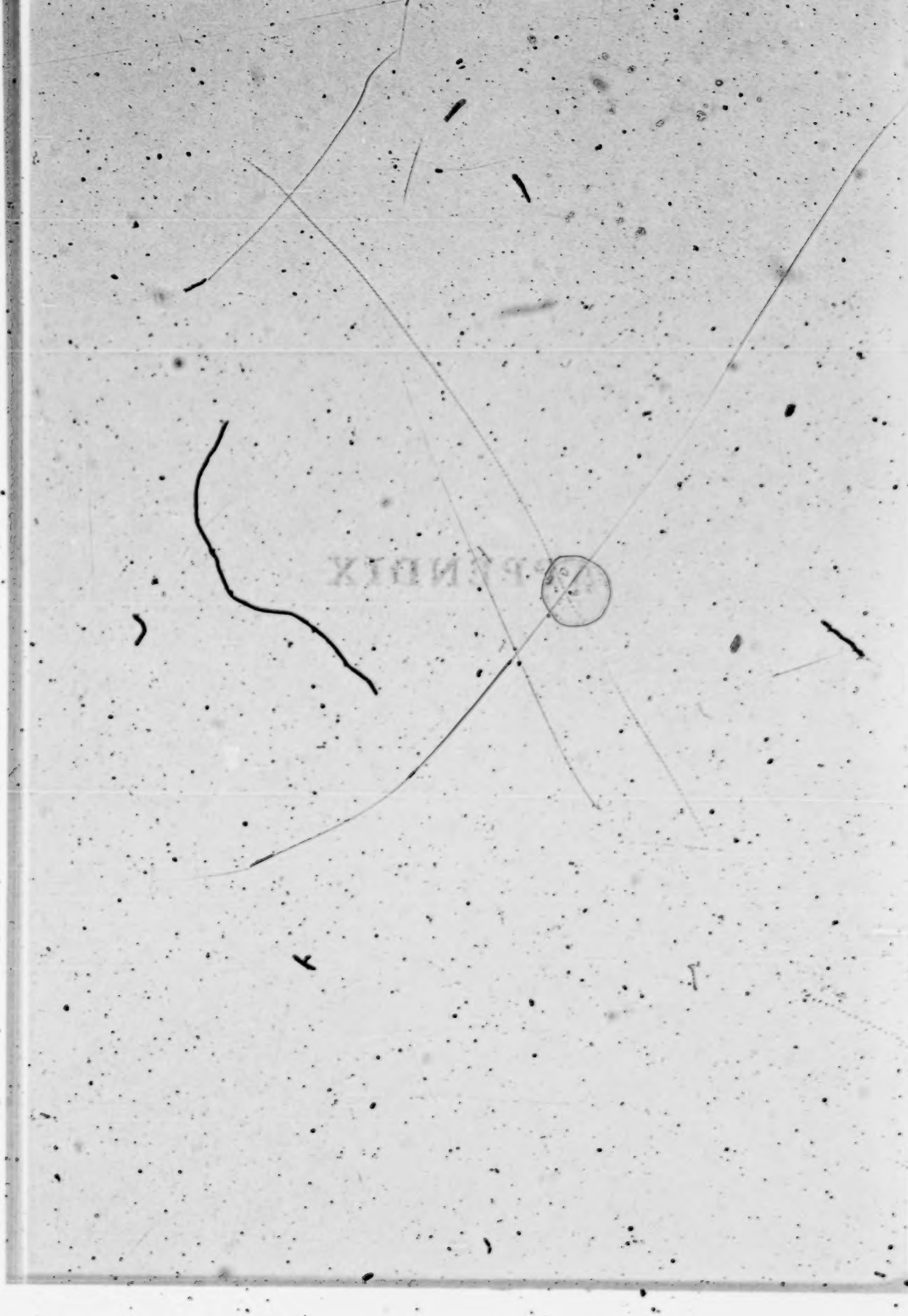

APPENDIX "A"

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1970 — APRIL SESSION, 1971

Nos. 18551, 18555, 18622, 18635

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JOHN PHILIP CERONE, SR., JAMES CERONE, JOSEPH FERRIOLA, DONALD J. ANGELINI, and DOMINIC CORTINA,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

September 15, 1971

Before SWYGERT, *Chief Judge,* STEVENS and SPRECHER, *Circuit Judges.*

SWYGERT, *Chief Judge:* These consolidated appeals challenge the validity of judgments of conviction entered upon jury verdicts which found defendants John P. (Jack) Cerone, Sr., Donald J. Angelini, Dominic Cortina, James

Cerone and Joseph Ferriola guilty of conspiring to violate 18 U.S.C. § 1952 in violation of 18 U.S.C. § 371 and which found Angelini guilty of a substantive violation of section 1952 as well. Because the defendants each challenge, inter alia, the sufficiency of the evidence to support their convictions, we shall recite the facts adduced at trial in some detail, viewing the evidence in the light most favorable to the Government as we must.

The major source of the Government's evidence against the defendants was Louis Bombacino, a paid informer who had been involved in the operation of defendants' alleged gambling conspiracy from late June of 1965 until about August of 1967.[1] Bombacino had been a rather unsuccessful criminal for much of his life, alternately attempting mail theft, forgery, robbery, extortion and the confidence game to support himself between the several prison terms he received for his endeavors. In April of 1965 while he was in jail awaiting trial on a state charge of robbery, Bombacino agreed to become an informer. Most of what follows is based upon his testimony.

Prior to the disposition of the robbery charge in September of 1965 (when he was placed on probation for a period of five years) but subsequent to his agreement to become an informer, Bombacino contacted Angelo Kokas, an old friend on June 25, 1965 and, pursuant to their conversation on that date, returned to the MGM Lounge in Chicago at about midnight on the following day. When he arrived, Kokas, Frank Aureli (a defendant as to whom a mistrial and severance were ordered because of his

[1] Bombacino received slightly in excess of $3000 over the period of 45 months or so during which he served as an informer for the Federal Bureau of Investigation.

sudden illness during the trial), defendant Ferriola, "Turk" Turello and John Varlas were seated together at a table in the restaurant portion of the Lounge. Bombacino went to the table and shook hands with Aureli, who inquired as to whether Bombacino was "going to give up getting [himself] in trouble all the time, back and forth, in and out of jail." Bombacino replied that was the reason he wanted to see Aureli, that he wanted to go to work for him. Aureli then looked at Ferriola, who nodded and told Bombacino: "You go to work for Frank [Aureli], but be careful. There are a lot of G heat on the street."[2]

In accordance with the foregoing conversation, Bombacino went to work for Aureli as an employee of the bookmaking operation conducted out of Aureli's apartment at 4355 South Sawyer. Bombacino's and Aureli's daily activities were essentially the same each day at the Sawyer Street address, except that on Monday mornings Bombacino would go to Johnny Manzella's sausage stand to pick up baseball betting sheets which showed the teams scheduled to play for the week with various columnar rulings which were used to record the pitchers for each team and the "line," that is, odds and point spreads on each game. Except for that Monday variation, each day Bombacino would go to 4355 South Sawyer at about 10 or 11 a.m. The line would be obtained by a telephone call placed by Aureli, and he and Bombacino would then remain at the apartment taking calls from bettors and recording bets until about 4 to 6 p.m. The total of the day's bets taken in by Aureli and Bombacino on June 27, 1965, Bombacino's first day on the job, was about $15,000, the record of which was turned over that evening to Johnny Manzella who was identified as "the boss of the district."

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[2] Bombacino testified that "G heat" meant agents of the Federal Bureau of Investigation.

About July 2, Aureli told Bombacino that Angelo Kokas was pocketing some of the bets he received and that they were going to Domenick's Pool Room. When they arrived at the poolroom at about 1 p.m., defendant Angelini, Kokas, Manzella and Joe Giancanna were already there. The group went into the poolroom section of the establishment (it also had a barber shop and candy counter) where Angelini told Kokas he was to call in all bets of $50 or more to Aureli. Kokas acquiesced without protest, and Aureli then gave Kokas a telephone number, whereupon Aureli and Bombacino departed.

About the middle of October, 1965, Aureli told Bombacino that they would be moving to Maywood, that they would be working for defendants Angelini and Cortina, and that Bombacino would no longer pick up schedules from Manzella. A day or two later, Bombacino and Aureli did move to 321 West Lake Street in Maywood. The location was described as a small store with a barricaded back door, equipped with two telephones and two buckets of water.[3] Bombacino and Aureli operated in the same fashion as before, except that on Monday mornings Bombacino would pick up schedules from the office of Angel-Kaplan Sports News Service (wholly owned by Angelini) at 236 North Clark Street in Chicago and he also drove Aureli to and from the Lake Street location each day. In addition, Bom-

[3] A day or two before the move to the 321 West Lake Street address, Aureli told Bombacino that they would be using dissolvable paper and that he would be picking up such paper at Jack Garber's printing shop. Garber testified that he had printed columnar and horizontal lines on such paper for Aureli as early as about June of 1965. With bets being placed over the telephone without money changing hands at the time of the placement of a bet, it is not difficult to understand the purpose of buckets of water at a bookmaking site where dissolvable paper was used.

bacino began to make the daily telephone calls to Angelini's office to obtain the line. Sometimes he spoke to Angelini personally in that regard. While at the Lake Street location, Aureli introduced Bombacino to John DiDomenico whom he identified as the bookkeeper for defendants Cortina and Angelini. DiDomenico picked up the betting records from Aureli and Bombacino on a daily basis, and on Sundays he "hung around" the Lake Street book and took bets over the telephone.

Three or four weeks after the move to Lake Street, Aureli and Bombacino moved again to a new location at 6955 West Grand Avenue shortly after Aureli informed Bombacino that they would so move. The characteristics of the new site and its equipment were essentially the same as at the former location. A day or so after the move, Aureli introduced Salvatore (Sammy) Molose to Bombacino at the book, stating that Molose was a good friend of Cortina's and that Aureli was going to teach him "the business." Bombacino's duties remained the same, however.

On January 7, 1966, the date another bookmaker named Andy Federenko was arrested, Aureli told Bombacino that they were going to the MGM Lounge to meet with Ferriola. They met Ferriola and Turello at the Lounge at about 7:30 p.m. Turello inquired of Aureli whether he knew anything about Federenko running an unauthorized book with Edward Bisacky that was taking in $50,000 per month. Aureli denied any such knowledge, and Ferriola instructed him to contact Federenko and determine whether he knew of any such book. The next evening Aureli told Bombacino that they were going to meet Federenko at the Division Street Bath House. They did so, and, in a conversation in the steam room, Federenko denied knowledge

of the book. Aureli expressed disbelief and stated to Federenko that he would have to answer to Ferriola since he had told Aureli to inquire of Federenko about the book. On January 10, Bombacino, Aureli, Manzella, Federenko and Ferriola met at a sausage stand, and Ferriola ordered Manzella to get Manzella's betting records for Ferriola's inspection. Ferriola further ordered Federenko to take no more bets and to turn over all his bets to Aureli.

Early in February, 1966, Aureli told Bombacino that the betting was getting too heavy so that the bettors could not get through to him on the telephone and that Cortina was looking for a new telephone. Bombacino offered to use his home telephone for receiving bets. Aureli said he would let Bombacino know as to whether that was acceptable, and within a day or two Aureli told him that he should get a telephone and that he "would be taking all out-of-town sports action at [his] home." Bombacino had a telephone installed at his apartment at 2540 North Mannheim Road and began booking at his apartment. His duties remained the same — Mondays only, pick up schedules from Angelini's office; daily transport Aureli from his apartment to his book at 6955 West Grand; daily get the line from Angelini's office; daily take bets over the telephone from about 11 a.m. to about 6 p.m.; and daily turn in betting records to DiDomenico in the evening. Bombacino received almost daily telephone calls from Nate Wigod, a "big bettor from Detroit."

Near the end of April, 1966, Aureli went to Miami, Florida for a week to ten days. During that period, he called Bombacino in Illinois every evening to inquire how the book had fared for the day.

During May or June, 1966, on the occasion of his taking some money to Angelini for Aureli, Bombacino had a con-

versation with Angelini in the latter's office. When Bombacino inquired as to how Angelini was doing, Angelini replied that he "didn't like baseball because it looks like [Angelini] was losing another $200,000 this year on baseball."

In the early part of June, 1966, Aureli told Bombacino that Aureli was going to move his book from 6955 West Grand to 6949 West Grand. Aureli stated that Molose would be working at home and that Bombacino would continue to take the out-of-town bets at his apartment.

Toward the end of July, Aureli was arrested for gambling at his book which had been moved from 6955 West Grand to 6949 West Grand. That evening, Aureli called Bombacino and, after some discussion, Aureli stated that the reason for the delay in getting out of jail was that Cortina "had a hard time getting hold of the attorneys." The following day, Aureli and Bombacino met Cortina at Meincher's Restaurant. At that time Cortina stated, "We are going to give Frank Aureli a vacation at this time because he had already a couple of arrests for gambling and just got busted again; therefore, Sammy Molose will take the local sports action at his house, [Bombacino] will take the out-of-town action at [his] house, and [I'll] take the rest of the action at [my] place."

The evening of December 7, 1966, Bombacino was visited by Cortina and Aureli at Bombacino's apartment. Cortina told Bombacino that Molose had been arrested and that he was concerned that police might have found Bombacino's telephone numbers in Molose's home or in his possession. Cortina then suggested that Bombacino change his telephone numbers, which he did. Aureli continued to pay Bombacino's telephone bills.

On December 27, 1966, Bombacino was called by a man who identified himself as "Lefty." Pursuant to that conversation, Bombacino went the next day to Meo's Norwood House Restaurant at about noon. He was directed by the waitress to the back of the dining room, where he recognized defendant Jack Cerone seated at a table with Paul DeLucia. Cerone said to Bombacino that he had been hearing nothing but favorable reports about Bombacino and that he had something in mind for him, but that he first had to talk to someone later on that day. He asked if Bombacino could meet him the next day at a bar called "The Leather Bottle" at 4 p.m., to which Bombacino replied he would. Cerone also stated to DeLucia that DeLucia knew Bombacino because Bombacino's brother used to make dietetic pastries for DeLucia. When Bombacino returned to his apartment, he called Aureli and told him of the conversation with Jack Cerone. Aureli replied, "Good. You're really getting up there."

The following day, Bombacino went to The Leather Bottle at the appointed time. He had a drink as he waited, and a few minutes after he arrived, a man who identified himself as "Lefty" came in and spoke to Bombacino. Bombacino then left the Leather Bottle and crossed the street, entering Armand's Pizzeria. There he saw Jack Cerone seated alone at a table in the back. Lefty went towards the bar in Armand's, leaving Cerone and Bombacino. Cerone told Bombacino he wanted him to service some big bettors in addition to those he had and that he wanted Bombacino to meet someone who would be in momentarily. A few minutes later, James Cerone came in. Jack Cerone began to introduce Bombacino to James, but James stated, "I know Lou for a long time." James Cerone sat down and told Bombacino that bettors would call him and iden-

tify themselves as "Goldstar" with some initials which would enable James to identify them. Jack Cerone then placed a telephone call within the hearing range of those at the table and asked to speak to Joe Pep (Giancanina). He then said into the telephone, "Be sure to tell Joe Nick [Ferriola] to be at . . . Armand's" at 8 that night. Jack Cerone further stated to Bombacino that if he had any problems he was to straighten them out with James Cerone, or, that failing, to contact Jack Cerone through the pizza maker at Armand's. That evening, Bombacino reported the conversation to Aurelli by telephone, prompting Aurelli to exclaim, "Well, you will be making more money than I will."

Bombacino returned to Armand's at 8 p.m. finding Jack Cerone and Ferriola already together there. Bombacino joined the two at a booth. Cerone started to introduce Bombacino to Ferriola, but Ferriola stated, "He has been with us a long time." Apparently nothing else transpired at that time.

Early in the evening about two weeks later, Bombacino again met with the Cerones at Armand's Pizzeria. Bombacino told Jack Cerone that "there was a lot of bookies being raided and [he] was a little on the shaky side because

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In this connection it should be noted that Bombacino was being paid $250 per week plus an occasional bonus. He stated he picked up his and Aurelli's pay envelopes each week at Chester and Brunswick's Schlair service station where such envelopes were stored in a safe. There was also evidence that Ancelini, Corina and Ferriola were seen on one or more occasions at the station or in the company of the Stomacks. The Stomacks were named in the indictment as unindicted co-conspirators. It is also noteworthy that, despite several changes in Bombacino's status and location, his basic rate of pay and the location at which he collected his weekly pay envelope never changed.

[he] was on probation." Jack Cerone replied that Bombacino should not worry because Cerone knew a judge who would take care of things if Bombacino were arrested. Jack Cerone and a companion then left, but Bombacino and James Cerone remained to review Bombacino's records of the week's "Goldblatt" bets. Subsequent to that conference, Jack Cerone would telephone Bombacino each evening, and Bombacino would turn over his records of that day's "Goldblatt" bets.

About March 14, 1967, Bombacino and Cortina met at the former's apartment and Cortina gave Bombacino some money to deliver to a local better of Aureli's who had come out ahead for the week. Bombacino made the delivery. On about the same date, Bombacino and Aureli also had a conversation at Bombacino's apartment. Aureli told Bombacino that there was a new system for taking bets whereby bettors would call Aureli and simply give their names to him, whereupon Aureli would telephone another man who, in turn, called the bettor to accept the bet. The record does not reveal whether Bombacino participated in the utilization of this new methodology.

Some time thereafter, Bombacino moved to a new apartment on Darryl Avenue where he continued to operate the book until late July or early August, 1967, when he received a telephone call from James Cerone in the early morning. James Cerone merely told Bombacino not to take any more bets and that no one would be calling him any longer and then hung up the telephone. Bombacino left Chicago in August of 1967.

The Government's case-in-chief included other evidence, testimonial, demonstrative and documentary, which is not related here and which tended to corroborate some of Bombacino's testimony.

The defendants' evidence was largely directed to an attack on the credibility of Bombacino. For example, the Sromeks testified that they never possessed or delivered envelopes at the request of defendants and that those of the defendants who had been in their service station from time to time were there to have their cars serviced. Fedcenko, Varlas, Kokas and Nicholas Kokenas (the owner of the MGM Lounge) testified in such manner as to place in dispute the veracity of certain meetings and other matters related by Bombacino. Peter Loquercio testified that his childhood friend, Joseph Ferriola, had acquired his nicknames of "Joe Nick" and "Joe Negal" as a child by the common practice in the Italian community of distinguishing boys whose first names were identical by adding the child's father's first name (in this case, Negal or "Nick") as a suffix to the boy's first name. Yolanda Bombacino's testimony tended to establish that she was married to Louis Bombacino and that he had deserted their marital home many years ago without the formality of a divorce and had become a bigamist, at best, or an adulterer.

Defendant Angelini offered testimony in his own defense. His testimony was directed to establishing the propositions that he was neither a gambler nor a conspirator to gamble; that his business was a legitimate one, at best, or, at worst, any illegality in it was an undiscovered legacy from a deceased partner who had started the business; and that he did not know Bombacino and had never participated in any of the conversations or meetings related by Bombacino.

I

Defendants challenge the sufficiency of the evidence to justify their convictions under several theories. They contend that the testimony of Bombacino was improperly admitted and that, without his testimony, there was no evi-

defence sufficient to convict them; that, even if Bombacino's testimony was properly admitted, there was insufficient evidence to convict; that, if there was evidence sufficient to establish their membership in a conspiracy with regard to gambling, there was insufficient evidence that the scope of the conspiracy included any anti-federal intent; and that the evidence established multiple conspiracies, some inherently local in nature, without establishing that any given defendant was a member of any anti-federal conspiracy. We disagree.

Defendants' argument that the testimony of Bombacino was inadmissible against them is essentially three-pronged. First, they assert that Bombacino, as a Government informer, did not possess the requisite intent to violate the law; since he was not a conspirator, therefore, they argue that his testimony should not have been admitted. This argument proceeds, however, on a basic misapprehension of the nature of Bombacino's testimony and of the co-conspirators exception to the hearsay rule. The defendants' argument would be valid if Bombacino had related extra-judicial statements made by *him* out of the presence of the defendants which were offered to prove the truth of the matters thereby asserted by Bombacino. *United States* v. *Morello*, 250 F.2d 631, 634 (2d Cir. 1957). But that was not the situation here. Bombacino's testimony was not a restatement of his own prior statements offered as tending to prove the truth of his assertions, but rather his testimony was that certain of the defendants had said and done certain things out of court and out of the presence of other defendants. Bombacino's testimonial role thus was identical to that of a recording device — hearing and seeing certain events, recording them in his memory and then, in effect, playing back the events through his testimony as they had occurred in his presence. Such extra-

judicial conversations with some defendants as had occurred out of the presence of other defendants constituted hearsay, it is true. However, extra-judicial statements and acts of co-conspirators occurring during a conspiracy and in furtherance of it have long been held to be competent evidence against their partners in crime under the ancient co-conspirators exception to the hearsay rule. *Clune* v. *United States*, 159 U.S. 590, 593 (1895); *Logan* v. *United States*, 144 U.S. 263, 308-09 (1892); *United States* v. *Jones*, 438 F.2d 461, 466 (7th Cir. 1971). Moreover, the district judge scrupulously instructed the jury during the presentation of Bombacino's testimony and at the close of the trial with regard to the limited applicability of the hearsay evidence prior to the jury's determination that the existence of the conspiracy and its membership had been proved. *United States* v. *Rizzo*, 418 F.2d 71, 82 (7th Cir. 1969), *cert. denied*, 397 U.S. 967 (1970); *United States* v. *Hoffa*, 349 F.2d 20, 41 (6th Cir. 1965), *aff'd*, 385 U.S. 293 (1966).

Secondly, defendants assert that admitting Bombacino's testimony violated the confrontation clause of the sixth amendment. However, in the plurality opinion of Mr. Justice Stewart in *Dutton* v. *Evans*, 400 U.S. 74 (1970), it is stated: "It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule [of exclusion] stem from the same roots. But this Court has never equated the two, and we decline to do so now." 400 U.S. at 86. *Dutton* held constitutional against a sixth amendment challenge a state statute which allowed the admission into evidence of hearsay statements of a defendant's co-conspirators made after the termination of the conspiracy but during the post-conspiracy period of concealment. Admittedly the federal co-conspirators exception is narrower than the statute there in question.

Lutwak v. *United States*, 344 U.S. 604 (1953); *Krulewitch* v. *United States*, 336 U.S. 440 (1949). But the sixth amendment's confrontation clause applies to the states through the fourteenth amendment with no less vigor than is true of its application to federal prosecutions. *See Pointer* v. *Texas*, 380 U.S. 400, 406 (1965). The refusal to equate the sixth amendment with the hearsay rule thus applies equally to federal and state prosecutions. Similarly, in *California* v. *Green*, 399 U.S. 149 (1970), the Court stated:

> While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. . . . The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied. 399 U.S. at 155-56.

Defendants' rights under the confrontation clause of the sixth amendment were not violated.

Finally in this regard, defendants argue that it was error to admit the testimony of Bombacino as to extra-judicial declarations and acts of the defendants absent prior independent proof of the existence, scope and membership of the conspiracy. It is axiomatic that such declarations and acts of a co-conspirator may not be admitted in evidence against a defendant absent independent evidence establishing his participation in the conspiracy. *E.g.*, *Glasser* v. *United States*, 315 U.S. 60, 74-75 (1942); *Ottman*

v. *Miller*, 407 F.2d 376, 378-79 (7th Cir. 1969); *United States* v. *Stadter*, 336 F.2d 326, 329 (2d Cir. 1964); *cf. Logan* v. *United States*, *supra*, at 144 U.S. 309. Defendants proceed from that well-established principle to assert that there was no such independent evidence here, or, in the alternative, that if there was independent evidence it was insufficient to validate the admission of Bombacino's testimony. These arguments miss the mark, for implicit in both is the assumption that all of Bombacino's testimony is admissible, if at all, under the co-conspirators exception to the hearsay rule. Even a casual reading of the record, however, reveals that much of Bombacino's testimony related extra-judicial admissions by word or act of a defendant which were properly admissible against that defendant. Although courts have admitted such evidence on the theory that the declarant's words or acts constituted an admission against interest, *e.g.*, *Opper* v. *United States*, 348 U.S. 84, 89-90 (1954), the better view is that such admissions are not hearsay at all and are admissible absent other reasons for exclusion. *E.g.*, C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 220 (1954); 4 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1048 (1940); STRAHORN, *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 484, 488-93 (1937). As evidence independent of the hearsay statement of a co-conspirator, such admissions may quite properly constitute corroborative evidence sufficient to justify the admission of a co-conspirator's hearsay declaration.

Such independent, non-hearsay admissions were abundant in this case. Jack Cerone was implicated as a conspirator by his actions at Bombacino's initial meeting with him on December 28, 1966, when he told Bombacino that he had heard nothing but favorable reports about

him. James Cerone was shown to be a conspirator by his meeting with Jack Cerone and Bombacino on December 29, 1966, at which time he told Bombacino the methodology of taking the "Goldblatt" bets soon after Jack Cerone had told Bombacino he would be servicing some additional big bettors. Ferriola was connected with the conspiracy by his actions at Bombacino's initial contact with the conspiracy at the meeting on June 25, 1965, when Ferriola stated, "You go to work for Frank [Aureli], but be careful. There are a lot of G heat on the street." Angelini was identified as a conspirator by his exercise of command authority at the meeting on July 2, 1965, when he ordered Angelo Kokas to call in all bets of $50 or more to Aureli. Cortina also made clear his involvement in the conspiracy when he told Bombacino late in July of 1966 that Aureli was being given a "vacation" because of his several recent gambling arrests and then assigned Bombacino to taking "the out-of-town action" at his apartment. There was thus ample independent evidence that each of the defendants was a participant in a conspiracy involving alleged gambling. Accordingly, the statements and acts of each defendant were admissible against all defendants. *United States* v. *Hickey*, 360 F.2d 127, 140 (7th Cir.), *cert. denied*, 385 U.S. 928 (1966).

As for defendants' contention that the evidence against them was insufficient to justify their convictions, we have no doubt that the record before us discloses sufficient evidence from which the jury could properly have determined that there was one conspiracy as charged in Count One of the indictment, that all of the defendants were members of such conspiracy, that the scope of the conspiracy included the jurisdictionally necessary anti-federal element of conspiring to use facilities in interstate commerce, and that at least one overt act in furtherance

of the conspiracy occurred subsequent to its inception and during the period covered by the indictment. A review of the evidence reveals that the conspiracy was characterized by a clearly defined hierarchy in which Bombacino was at, or near, the bottom and subject to the orders of all the defendants. From such a vantage point, Bombacino's ability to observe the workings of the conspiracy was restricted; but, due to the apparent trust placed in him as a rising minion or, perhaps, to an overabundance of confidence, the defendants readily revealed their respective positions in the conspiracy, as well as its scope, to Bombacino by their words and deeds. From the evidence adduced at trial, we are satisfied that the jury could properly have determined that the defendants' guilt was established beyond a reasonable doubt.

Defendants contend further, however, that proof of specific knowledge of the use of facilities in interstate commerce is essential to a conviction for conspiring to violate 18 U.S.C. § 1952 and that there was no proof of such knowledge as to any of them adduced at trial. The Government asserts, on the other hand, that proof of specific knowledge of the use of facilities in interstate commerce is not essential to a conviction for conspiracy to violate section 1952, citing *United States* v. *Hanon*, 428 F.2d 101 (8th Cir. 1970), *cert. denied*, 402 U.S. 952 (1971), and *United States* v. *Roselli*, 432 F.2d 879 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971), which squarely held such proof is not required. However, we need not decide whether the *Hanon-Roselli* rule should be followed in this circuit, for we are convinced that this record contains ample proof of the knowledge of each of the defendants that the use of facilities in interstate commerce was included within the scope of the conspiracy. We believe the jury could properly have found from the evidence, as it did, that all defendants had conspired to use such facilities for illegal gambling.

The proof in this case established that Bombacino, as the underling he was, was moved from place to place several times and was subjected to changes of duties at the whim of the defendant. The evidence adduced clearly proves that Bombacino was subject to the orders of each of the defendants, and, moreover, was paid the same amount from the same source regardless of the nature of his duties, the location of his place of business, or the identity of his apparent superiors. The evidence is also unequivocal that shortly after Bombacino was received as a co-conspirator he began to receive telephone calls from out-of state bettors without any evidence whatever that he had solicited such business in any way. And it is also clear that Bombacino continued to receive such out-of-state telephone calls without interruption regardless of changes in the nature of his duties, the location of his place of business, the identity of his apparent superiors, and even without regard for changes in his telephone numbers on little advance notice, all without evidence of Bombacino's having communicated such changes to out-of-state bettors. Given such evidence and in light of other competent evidence of the hierarchial nature of the conspiracy and the constant exchange of information among the conspirators, we believe the jury was entitled to conclude that out-of-state telephone calls from bettors were induced by the defendants originally and that changes in Bombacino's scope of operation, his location, and his telephone numbers were transmitted to out-of-state bettors by the defendants or by others at their direction. Consequently, we conclude that there was ample evidence that all of the defendants were aware of the anti-federal element of the conspiracy and participated in it.

Defendants' additional argument that multiple conspiracies were proved under Count One is predicated upon the

unlikely theory that each time Bombacino's duties or locus of operation changed a new conspiracy was revealed. The evidence belies that theory, especially the evidence that Bombacino's compensation remained the same despite such changes, and we reject that argument as well.

Thus we are satisfied that the evidence adduced at trial, viewed in the light most favorable to the Government, amply supports the jury's verdict that all of the defendants were guilty as charged in Count One of the indictment.

II

Defendant Angelini argues that 18 U.S.C. § 1952 is unconstitutional as violative of the first, sixth and ninth amendments to the Constitution, as well as attacking its application to him as constituting an ex post facto law forbidden by article one, section nine, clause three of the Constitution. We hold that each of these contentions is without merit.

Angelini's first amendment argument is, in essence, that, since newspapers and other media frequently report predictions as to the outcomes of various athletic events — indeed, some of which are similar to or based upon Angelini's computation of odds and point spreads — and such communication is protected by the first amendment, Angelini's telephonic communication of such information is similarly protected. We rejected such an assertion in *United States v. Lokietis*, 385 F.2d 487, 489 (7th Cir. 1967), *vacated on other grounds*, 390 U.S. 338 (1968), and we again reject it. Angelini's first amendment claim erroneously proceeds on the implicit assumption that the known use and purpose of communication is not relevant to the determination of whether the communication may be prohibited consistent with the first amendment. It is clear that speech or conduct ordinarily protected by the

Constitution may lose that protection because of the intent of the speaker or actor or the context within which it occurs. *E.g., Ginzburg* v. *United States*, 383 U.S. 463 (1966). The communication of opinions as to the outcome of future athletic contests may not threaten valid community interests in other contexts, but such communication clearly threatens legitimate community interests when it occurs as a part of an illegal gambling operation crossing state boundaries.

Angelini's assertion that section 1952 violates the sixth amendment in that it is so vague that persons of common understanding are not adequately advised of what it is that is proscribed similarly lacks merit. In *United States v. Zizzo*, 338 F.2d 577, 579 (7th Cir. 1964), *cert. denied*, 381 U.S. 915 (1965), we squarely held that section 1952 was constitutional against a challenge on the ground that it was vague. We reaffirm that holding.

As a further ground for his assertion that section 1952 is unconstitutional, Angelini argues that the statute "enlarg[es] a state statute in violation of the ninth amendment." The gist of this argument is that section 1952 was meant to aid the states in the enforcement of their criminal statutes where facilities in interstate commerce were used in the violation of such statutes; that the statute the enforcement of which is here being aided, Illinois Revised Statutes, Chapter 38, Section 28-1 (a), is subject to a statute of limitations of eighteen months; and that section 1952 incorporates the statute of limitations of the state statute it is aiding. Ergo, Angelini argues, since this prosecution was not commenced within the eighteen month limitation period, the convictions must be reversed. However, as Mr. Justice Clark, sitting on this court, stated in *United States* v. *Karigiannis*, 430 F.2d 148, 150 (7th Cir.), *cert. denied*, 400 U.S. 904 (1970):

> [T]he gravamen of a charge under § 1952 is the violation of federal law and "reference to state law is necessary only to identify the type of unlawful activity in which the defendants intended to engage." [Citing *United States* v. *Rizzo*, 418 F.2d 71, 74 (7th Cir. 1969), *cert. denied*, 397 U.S. 967 (1970).]

Thus the fact that the illegal activity in furtherance of which facilities in interstate commerce were used could not be prosecuted under state law because of Illinois' statute of limitations is irrelevant to a prosecution under 18 U.S.C. § 1952. Indeed, as we held in *United States* v. *Rizzo*, 418 F.2d 71, 80 (7th Cir. 1969), *cert. denied*, 397 U.S. 967 (1970), proof of the violation of the state statute to which reference is made for purposes of prosecution under 18 U.S.C. § 1952 is not an essential element to be proved in such a federal prosecution. State law thus serves merely a definitional purpose under section 1952. That being the case, section 1952 does not enlarge state criminal statutes at all because it punishes the use of facilities in interstate commerce in furtherance of enterprises violative of state statutes; it does not punish substantive violations of the state statutes per se. Section 1952, therefore, does not "enlarge a state statute in violation of the ninth amendment" as contended by Angelini.

Angelini's final attack on the constitutionality of section 1952 is the assertion that it constitutes an ex post facto law violative of article one, section nine, clause three of the Constitution. The theory of this argument is that section 1952 on its face proscribes the use of interstate facilities in any form in furtherance of gambling, thereby rendering it violative of the first amendment by Angelini's lights; that the statute was not narrowed to constitutionally permissible scope until *Angelini* v. *Illinois Bell Tel. Co.*, 418 F.2d 111 (7th Cir. 1969), *cert. denied*, 397 U.S.

1040 (1970), limited its application to rapid transmission of gambling information; and that such limitation did not occur until after the conduct which gave rise to this prosecution had occurred. Taking Angelini's argument at face value, we do not find the limiting construction of section 1952 to be an unreasonable interpretation of the statute which, if such were the case, might provide an arguable basis for his ex post facto law assertion. *Williams v. United States*, 179 F.2d 644, 647 (5th Cir. 1950). 18 U.S.C. § 1952 does not constitute an ex post facto law as applied here.

III.

Defendants also assert that certain procedural or trial errors require the reversal of their convictions. They argue that the district court should have ordered production of the minutes of the grand jury which led to an indictment which was subsequently superceded by a second indictment upon which this trial proceeded; that the district court improperly limited defendants' discovery of certain evidence of electronic eavesdropping; that the district court erred in admitting certain testimony of the United States Attorney; that the prosecutor's conduct, especially in final argument, was improper and prejudicial, and that such defects were uncured before verdict; that the trials of these defendants should have been separate for one or more reasons; that the divulgence of certain telephone toll call records to the Government violated 47 U.S.C § 605; and that the seizure and introduction into evidence of certain unopened mail discovered in Angelini's office was improper. We find each of these arguments to be without merit.

Production of the minutes of the proceedings of the grand jury which returned the original indictment in this case was not necessary, nor, we believe, would it have been helpful to the defendants. Grand jury minutes are not

available as of course to defendants in federal criminal trials, but rather may be made available in the exercise of the trial court's discretion when the defense has shown that " 'a particularized need' exists for the minutes which outweighs the policy of secrecy [of the grand jury's proceedings]." *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 399-400 (1959). Here, the initial indictment was based upon the testimony of an agent of the FBI who testified as to the contents of Bombacino's reports to that agency. Bombacino himself did not testify at all at the first grand jury proceeding which related to this cause. Although the first indictment named only Jack Cerone, Aureli and Angelini as defendants and the superseding indictment added James Cerone and Ferriola as additional defendants, that disparity does not supply the "particularized need" showing required by *Pittsburgh Plate Glass Co.* The agent's testimony which led to the first indictment was based on Bombacino's statements to various FBI agents, copies of all of which statements were given to defendants in the course of the trial. The minutes of the first grand jury proceeding thus could not be useful either for impeachment or cross-examination purposes, for the defendants had at their disposal the best evidence of what was the basis of the charges against them under both indictments. In addition, the trial court compelled the production of the minutes of the second grand jury proceedings. Defendants were not entitled to more.

Ferriola contends that the disclosure of electronic eavesdropping required by the district court was insufficient and prejudiced his ability to eliminate illegally obtained evidence from the trial. That contention is groundless. The Government provided Ferriola with copies of "logs" of all illegally overheard conversations in which he was identified as a participant. It was also established that

nothing illegally overheard as revealed in such logs was relevant to this trial; and, in addition, the district court examined in camera a voluminous sheaf of logs containing reports of unidentified voices overheard and found that none of such logs was relevant to this trial. Indeed, it was established that "every time there was a possibility" in the view of the overhearing agent that Ferriola was present at an illegally overheard conversation the fact was recorded, and logs of all such occasions were made available to him. Moreover, Ferriola made no showing of his standing to object to any illegally overheard conversations other than those as to which logs were provided him. The trial court thus committed no error in its management of Ferriola's discovery of evidence obtained by illegal eavesdropping.

Defendants also assert that the district court erred in admitting the testimony of the then United States Attorney, who was not personally prosecuting this case. They argue that the presence of the United States Attorney as a witness for the prosecution was prejudicial because of the prestige of his office; that his testimony was not properly admitted as rebuttal testimony to controvert the testimony of defendants' witness Kokenas; and that, while the fact of his testifying was itself prejudicial, his testimony that Kokenas expressed fear of "those fellows" was unduly prejudicial, and its admission served no legitimate purpose. As to the awesome-office theory, we do not agree that the mere fact that a witness holds an office of public trust should disqualify him as a witness if he would otherwise be able to offer relevant, competent and material evidence as to any issue in a trial. Defendants offered Kokenas as a witness apparently to create the impression in the jurors' minds that the prosecutors had withheld from the grand jury and defense counsel evidence favorable to defendants. On direct examination, Kokenas,

who owned the MGM Lounge, testified that Ferriola never met anyone or ate in the Lounge but sometimes came in to pick up carry-out food, thus contradicting the Government's evidence of the meeting held there on June 26, 1965. He also testified that he had told the Government the same thing when they questioned him and that a meeting with the United States Attorney in the offices of his former law firm had not been suggested by him in any way. The United States Attorney testified in rebuttal that Kokenas had said that he had seen Ferriola, Turk Turello, Angelo Kokas and Aureli together in the Lounge at times, but didn't know if they were there on June 26, 1965. He also testified that Kokenas had said that he couldn't talk to anyone in the federal building, stating, "I can't talk to you here. Those fellows can't know that I am talking to you." He testified that Kokenas had said he was willing to talk to him in some place other than the federal building. It is clear, therefore, that there was direct contradiction between Kokenas' testimony and that of the United States Attorney. It is also clear that evidence of his fear may be presented as a means of demonstrating a witness' bias, thereby tending to discredit him. *United States* v. *DeLutro*, 435 F.2d 255, 256-57 (2d Cir. 1970); *United States* v. *Schemault*, 429 F.2d 852, 855 (7th Cir. 1970). As for defendants' argument that they were prejudiced by the failure of the United States Attorney to identify which, if any, of the defendants Kokenas was afraid of, we conclude that defendants waived that issue by failing either to cross-examine the United States Attorney or to call Kokenas in surrebuttal on that point. *United States* v. *Cook*, 432 F.2d 1093, 1101-02 (7th Cir. 1970), *cert. denied*, 401 U.S. 996 (1971).

Defendants further claim that the conduct of the prosecutors was prejudicial, both during the trial-in-chief and during the Government's closing argument. Defendants

cite several incidents of allegedly prejudicial conduct as being sufficiently damning as to require reversal. Having carefully reviewed the entire record of this trial, however, we do not believe that any such incident or series of incidents cited by defendants deprived them of a fair trial. It is true that in the heat of trial the prosecutors made occasional rash statements which were to some degree improper. However, the district judge rectified such problems by appropriate admonitions to counsel and the jury, and the offending prosecutor apologized, sua sponte and in the presence of the jury, to the court and counsel for one such inappropriate comment. As Judge Learned Hand stated in *United States* v. *Wexler*, 79 F.2d 526, 529-30 (2d Cir. 1935), *cert. denied*, 297 U.S. 703 (1936):

> It is impossible to expect that a criminal trial shall be conducted without some show of feeling; the stakes are high, and the participants are inevitably charged with emotion. Courts make no such demand; they recognize that a jury inevitably catches this mood and that the truth is not likely to emerge, if the prosecution is confined to such detached exposition as would be appropriate in a lecture, while the defense is allowed those appeals in misericordiam which long custom has come to sanction. The question is always as to the particular incident challenged, in the setting of the whole trial.

We hold that the prosecutors' conduct, in the context of the whole trial and in view of the district judge's scrupulous policing of arguable improprieties, was not prejudicial.

Defendants also assert as error the failure of the district court to sever the trial of each defendant. It is well established that a district court's denial of motions for severance may constitute reversible error "only if prejudice is so clearly shown that refusal of a severance is an abuse of discretion." *United States ex rel. Durso* v. *Pate*, 426

F.2d 1083, 1089 (7th Cir. 1970), *cert. denied,* 400 U.S. 995 (1971). No such showing of prejudice has been made here.

Angelini argues that the disclosure to the FBI by the telephone company of its toll call records with regard to telephones listed to Bombacino, Sammy Molose, Model Construction Company (a fictitious company in whose name the telephone was answered at the 6955 West Grand Avenue book) and Frank A. DeSoto (Aureli's alias at the 4355 South Sawyer book) violates 47 U.S.C. § 605. He makes the same argument with regard to the disclosure to the FBI by the management of the Washington Pines Hotel, one of Aureli's residences, of similar records with regard to the telephone in Aureli's room. Assuming that Angelini has standing to interpose this objection, we agree with the determination of the Second Circuit in *United States* v. *Covello,* 410 F.2d 536, 541-42 (2d Cir.), *cert. denied,* 396 U.S. 879 (1969), that such records made and maintained in the ordinary course of business for accounting purposes are properly to be accorded the same evidentiary treatment as the records of other businesses and are without the scope of section 605. Such disclosure as occurred here did not violate 47 U.S.C. § 605.

Angelini also contends that the seizure of certain unopened mail discovered in his office upon the execution of valid search warrants was illegal. He also contends that the opening of one such envelope addressed to John DiDomenico in care of Angelini's firm and the introduction into evidence of the envelope itself was improper. We determined that the search and seizure was proper in *Angelini* v. *Illinois Bell Tel. Co.,* 418 F.2d 111, 115 (7th Cir. 1969), *cert. denied,* 397 U.S. 1040 (1970), when Angelini's counsel specifically raised the issue of the propriety of the seizure of a number of items, including the unopened

mail. Angelini cites no convincing reason to disturb that determination, and we shall not do so. His contention with regard to the opening of the DiDomenico letter is vague and unpersuasive, especially in view of the fact that the contents of the envelope were not offered in evidence. We find no error.

IV

Finally, Angelini raises several challenges which relate only to the validity of his convictions. He asserts that Count Three of the indictment was insufficient to charge an offense and that, if it was, the evidence was insufficient to convict him on that count; that it was improper to permit the use in this case of his testimony in a prior civil proceeding to compel the Government to have his telephone service reinstated after it had been terminated pursuant to 18 U.S.C. § 1048(d); and that the Government's trying him on Count Three after having terminated his telephone service pursuant to 18 U.S.C. § 1084(d) subjected him to double jeopardy.

Angelini's argument that Count Three of the indictment is inadequate to charge to offense is without merit. He bases his argument on the theory that an indictment charging a substantive violation of 18 U.S.C. § 1952 must recite the particulars of the use of the interstate facility charged. The indictment recited all of the necessary elements of the offense. *See Turf Center, Inc.* v. *United States*, 325 F.2d 793, 796 (9th Cir. 1963). It did omit the opposite pole of the use of an interstate facility, stating only that the United States mail was used "in interstate commerce" "at Chicago, Illinois" on or about a certain date. However, the question of the location of the other terminal of the use is in the nature of evidentiary matter to be dis-

covered by a motion for a bill of particulars. *Carbo* v. *United States*, 314 F.2d 718, 731-33 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964). The additional information desired by Angelini was supplied by the Government in its bill of particulars provided pursuant to his motion. We hold that Count Three of the indictment was sufficient to charge an offense under 18 U.S.C. § 1952.

Angelini's challenge to the sufficiency of the evidence to convict him on Count Three is based chiefly on two theories: that, since the use of the mails was an out-of-state customer's mailing a payment to him, he did not use the mails and that there is no evidence negating the possibility that the payment to Angelini was for printed schedules sold to the general public and not for providing the line. There was evidence before the jury that the customer had paid Angelini $350 for a football season's service and that the printed publication Angelini distributed cost $.25 per copy per week. There was no evidence that the customer subscribed to more than one copy per week; indeed the evidence was that he subscribed for his personal use alone. We believe the jury was entitled to infer arithmetically that much of the $350 fee was for the line provided by Angelini, especially in view of the fact that the evidence established that the customer called Angelini as frequently as a dozen times a week. Therefore, even if we assume that Angelini's printed materials were not prohibited from interstate distribution, the evidence was sufficient to establish that Angelini made use of the mails to distribute the line to his out-of-state customer who also made use of the mails in paying for Angelini's services. The evidence of guilt under Count Three was adequate.

The contention is also meritless that introduction in this trial of Angelini's prior testimony in the suit he

filed to reinstate his telephone service terminated pursuant to 18 U.S.C. § 1084(d) violated his fifth amendment privilege against self-incrimination. As clearly held in *Telephone News Sys., Inc.* v. *Illinois Bell Tel. Co.*, 220 F. Supp. 621, 628 (N.D. Ill. 1963) (three-judge court), *aff'd mem.*, 376 U.S. 782 (1964), the Government has the burden of proving the propriety of termination in a suit brought to compel the reinstatement of telephone service terminated pursuant to section 1084(d). As the court there said regarding such actions, "[P]laintiff is at no point required to come forward with evidence, much less testimony, until defendant has satisfied this burden. Even then, a plaintiff is not required to take the stand or incriminate himself." In Angelini's civil suit for restoration of his telephone service, he was called as an adverse witness by the Government pursuant to Rule 43(d) of the Federal Rules of Civil Procedure. Upon objection by Angelini's counsel, the Government attorney correctly stated to Angelini that his fifth amendment privilege was available to him. Angelini did not assert his privilege and testified *both* as an adverse witness on behalf of the Government and as a rebuttal witness on his own behalf. Angelini thus waived his fifth amendment privilege without compulsion by the Government since, as is stated above, it was the Government, not Angelini, who had the burden of proof in the section 1084(d) suit.

Angelini also argues that termination of telephone service pursuant to 18 U.S.C. § 1084(d) followed by prosecution for violation of 18 U.S.C. § 1952 arising out of the same conduct violates the prohibition against double jeopardy under the fifth amendment. However, as

the Supreme Court said in *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938):

> Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether [the statute there in question] imposes a criminal sanction. That question is one of statutory construction.

Here, the question therefore becomes whether 18 U.S.C. § 1084(d) imposes a criminal sanction. It is clearly established that section 1084(d) is nonpenal in intent and does not impose criminal sanctions. *Telephone News Sys., Inc.* v. *Illinois Bell Tel. Co., supra*, 220 F.Supp. at 628-33. Angelini has not been subjected to double jeopardy for the same offense.

The judgments of the district court are affirmed.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

Tuesday, October 26, 1971.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 18551 vs.

JAMES CERONE and JOHN PHILIP CERONE, Sr., a/k/a Jack Cerone,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

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On consideration of the petition for rehearing and suggestion that it be heard en banc filed in the above entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and a majority of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above entitled cause be and the same is hereby denied.

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SUPREME COURT

Nos. 71-720, 71-759 and 71-760

In the Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U.S.
FILED
JAN 31 1972
E. ROBERT SEAVER, CLERK

JOHN PHILIP CERONE, SR. AND JAMES CERONE,
PETITIONERS

v.

UNITED STATES OF AMERICA

DONALD J. ANGELINI, PETITIONER

v.

UNITED STATES OF AMERICA

DOMINIC CORTINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-720

JOHN PHILIP CERONE, SR. AND JAMES CERONE,
PETITIONERS

v.

UNITED STATES OF AMERICA

No. 71-759

DONALD J. ANGELINI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 71-760

DOMINIC CORTINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Illinois, petition-

455-751—72——1

ers and a co-defendant, Ferriola,[1] were convicted of having conspired to violate 18 U.S.C. 1952 with respect to illegal gambling. Petitioner Angelini was also convicted of one substantive violation of 18 U.S.C. 1952. They were each sentenced to five years' imprisonment and fined $10,000 on the conspiracy count (the fine was suspended with respect to petitioner Cortina); petitioner Angelini was also sentenced to five years' imprisonment and a $10,000 fine on the substantive count, both to be concurrent with his sentence under the conspiracy count. The court of appeals affirmed in a comprehensive opinion (Pet. App. A).[2]

The government's case against petitioners was based primarily on the testimony of a government informer, Louis Bombacino. The evidence, which is summarized in the opinion below (Pet. App. A2–11), showed essentially that Bombacino had worked as a bookmaker in a gambling syndicate in which petitioners were part of the hierarchy. Under the direction of petitioners, Bombacino accepted bets on sporting events by telephone, including some interstate calls. Bombacino identified each of the petitioners and indicated their knowledge and direction of the conspiracy by relating various meetings involving each of them.

1. All of the petitioners contend[3] that the co-conspirator exception to the hearsay rule constitutes a

[1] Ferriola has filed a motion in this Court seeking an extension of time within which to file his petition for certiorari. The case of another co-defendant, Aureli, was severed during trial.

[2] Pet. App. refers to the appendix in the petition of John and James Cerone.

[3] Cerone Pet., Point 1, Cortina Pet., Point 1, and Angelini Pet., Point 8.

denial of their rights of confrontation under the Sixth Amendment. In addition to the arguments advanced below and rejected by the court of appeals (Pet. App. A 11–16), petitioners here claim that the dismissal of the writ of certiorari in *Bostic* v. *United States,* 402 U.S. 547, indicates that the hearsay exception for statements of co-conspirators is no longer valid. This is incorrect. The Court's statement of its reasons for dismissal of the writ in *Bostic* shows that, in granting certiorari, the Court had erroneously assumed that the case presented an issue as to whether a person who had been removed from the conspiracy by his arrest could be held responsible for substantive crimes later committed by co-conspirators, which had not been within the contemplation of the conspiracy at the time of arrest. The dismissal of the writ had nothing whatsoever to do with the evidentiary rules relating to co-conspirator statements. As pointed out by the court below (Pet. App. A 13–14), the decision in *Dutton* v. *Evans,* 400 U.S. 74, upholding the right of the states to adopt a co-conspirator rule broader than that of the federal courts, recognized that the traditional co-conspirator exception to the hearsay rule did not violate a defendant's right of confrontation.

2. Petitioners John and James Cerone also contend that their conspiracy convictions should be reversed because there was no direct proof that they had knowledge of the interstate aspects of the conspiracy (Cerone Pet., Point 3). They claim that the government conceded below that they had no such knowledge (Cerone Pet. 21). This is incorrect. The full

sentence from the government's brief (p. 62), which petitioners only partially quoted makes clear that the government's "concession" was on an *arguendo* basis:

> Even if we were to agree that some of the defendants had no knowledge of the conspiracy's interstate activities, it does not follow that the evidence is insufficient to sustain the verdict on Count I.

The government's *arguendo* position below was that a particular conspirator need not have knowledge of the interstate aspect of the activities for his conviction of conspiracy to violate 18 U.S.C. 1952 to be valid. *United States* v. *Roselli*, 432 F. 2d 879, 891–892, (C.A. 9), certiorari denied, 401 U.S. 924; *United States* v. *Hanon*, 428 F. 2d 101, 108 (C.A. 8), certiorari denied, 402 U.S. 952. It is, however, unnecessary to rely upon this proposition here. The trial court charged the jury that knowledge that interstate telephone lines or mails would be used as part of the conspiracy was a necessary element of the offense with respect to each defendant (Tr. 2161). The jury thus necessarily found that the Cerones had such knowledge and the court below properly concluded that there was "ample evidence" to support this finding (Pet. App. A 17–18).

3. Petitioner Cortina contends that the trial court erred in allowing the government informer, Bombacino, to testify that he had contacted the F.B.I. after certain meetings (Cortina Pet., Point 2). Cortina claims that evidence of these contacts raised an in-

ference that Bombacino made reports at those times, which would constitute inadmissible, prior consistent statements. Since there was no testimony as to what, if anything, was said in these contacts, there was clearly no error in permitting the testimony.'

4. Petitioners' other contentions were fully answered in the opinion of the court of appeals on which we rely.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1972.

'The court of appeals found it unnecessary to comment on this allegation of error.

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